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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MECHANICS BANK, as Trustee, etc.,

Plaintiff and Respondent,

v.

ROBERT F. HINK,

Defendant and Appellant.

A145963

(Contra Costa County
Super. Ct. No. P14-00218)

A trust income beneficiary was required to litigate a challenge to her status and entitlement to payments from the trust by a remainder beneficiary. The probate court ordered payment of the income beneficiary's attorney fees from trust principal. Another remainder beneficiary unsuccessfully objected and now challenges the fee award on appeal. We conclude the probate court did not have the equitable power to order the fees paid from trust principal. We remand for the court to consider whether the fees should be paid from trust income pursuant to a discretionary payments provision of the trust instrument.

I. BACKGROUND

In 1977, Lester Hink created the Lester W. Hink Trust and named Mechanics Bank as the trustee (Trustee). When Lester¹ died several days later, the trust became

¹ For ease of reference several persons are referred to by first name. No disrespect is intended.

irrevocable and two subtrusts were created—only one of which remains in existence (hereafter the Trust).²

According to its terms, “[t]he principal purpose of [the Trust] is to provide income for [Lester’s] sons and daughter-in-law, MARILYN J. HINK^[3] (if she survives [Lester’s] son, JAMES FULTON HINK) and [Lester’s] daughter” (the income beneficiaries). Trust assets consist of income-generating real property. Equal monthly distributions of income are made to each surviving sibling, with James’s share continuing to Marilyn until her death in the event she survived James.⁴ The Trustee is allowed to increase or decrease monthly payments based on the amount of net trust income, as well as to make additional discretionary payments from Trust income if the Trustee determines that “such increased income is reasonably necessary to assist the beneficiaries to cover their reasonable needs” (discretionary payments provision).⁵ Upon the death of all income beneficiaries, the

² Upon Lester’s death, some immediate distributions were made and the remainder of trust assets were divided between two subtrusts, one of which terminated when Lester’s youngest son turned 35.

³ Marilyn’s surname later became Ragan.

⁴ Individual monthly distribution amounts increase as the number of surviving income beneficiaries decline: “Upon the death of both [James and Marilyn], or upon the death of [another sibling], the monthly payment to the surviving beneficiaries shall be increased from [\$500] per month to [\$700]; such monthly payments shall further be increased to [\$900] per month when there are only two surviving beneficiaries ([James and Marilyn] shall be considered a single beneficiary for the purpose of this paragraph) and shall be increased to [\$1,000] per month when there is only one such beneficiary surviving.”

⁵ Specifically, the Trust allows the Trustee in its “discretion to determine, from time to time, that the aforesaid monthly payments may be increased beyond those hereinabove set forth, if the trustee shall first determine that such increased payments are feasible in light of the then current net income of the trust, may be made without endangering corpus of the trust, and such increased income is reasonably necessary to assist the beneficiaries to cover their reasonable needs.” However, “[t]he trustee shall not invade corpus of this trust for any purpose except that it may distribute all or part of available cash, although technically for tax or bookkeeping purposes it constitutes a reserve for depreciation. [¶] . . . In the event the income from this trust shall at any time be insufficient to make the [monthly distributions], the payment to each of the

Trust corpus and any undistributed income is to be distributed (after an initial charitable contribution) equally to the children of the five siblings, or their issue per stirpes (the remainder beneficiaries). Among the remainder beneficiaries was Elizabeth R. Walker.

James and Marilyn were much younger than James's oldest sibling and younger than several of the issue of James's siblings. James and Marilyn divorced in 1989. James died in 2013, survived by Marilyn who was then 62 years old. According to Walker, Marilyn did not receive any part of the monthly distribution to James between the time of the divorce and James's death. In February 2014, the Trustee petitioned for instructions about, as relevant here, whether to pay Marilyn monthly income distributions for the rest of her life pursuant to the terms of the Trust instrument; and, if so, whether to increase the monthly distributions to include all of the Trust's net income for purposes of minimizing tax liability and whether to make additional discretionary payments to assist in covering Marilyn's reasonable needs. The Trustee reported the Trust's fair market value as of November 2013 was more than \$4 million, annual Trust income was about \$80,000, and annual charges against income were about \$20,000. While James was alive, the Trustee had exercised its discretion to make payments for the benefit of him and his dependents "for medical insurance, medical expenses, rent and the like." In 2012, those discretionary payments totaled about \$101,600, approximately \$8,466 a month, yet the Trust still had \$136,146.09 in retained income.

Walker objected to the Trustee's petition and filed a petition of her own. She argued that Marilyn should not be recognized as an income beneficiary; instead, the Trust should be terminated and its assets distributed to the remainder beneficiaries. Walker urged the court to interpret the Trust document's initial reference to "*daughter-in-law, [Marilyn] (if she survives [James])*" (italics added) as conditioning Marilyn's entitlement to income distributions on her still being married to James at the time of his death. In the alternative, Walker asked the court to reform the Trust document to so provide. She

beneficiaries entitled from time to time to share in the income of this trust shall be reduced proportionately."

noted that if Marilyn were deemed an income beneficiary the remainder beneficiaries were unlikely to receive any significant personal benefit from the Trust given their advanced age compared to Marilyn's age. Walker further opposed the Trustee's request to make additional discretionary payments to Marilyn, arguing the Trustee had not shown such payments were reasonably necessary to assist Marilyn in covering her reasonable needs. Walker also argued the proposal to pay all net income to Marilyn had no basis in the Trust document, which anticipated excess income would be retained for the remainder beneficiaries' benefit. Walker charged the Trustee with partiality for failing to inform the court of the effect of its proposed actions on the remainder beneficiaries.

Marilyn hired counsel, who filed papers in support of the Trustee's petition and opposing Walker's petition. In March 2014, the court made an interim order directing Trustee to pay Marilyn \$1,000 monthly distributions retroactive to the date of James's death and continuing until September 2015 or further order of the court. Following mediation in July 2014, Walker dropped her objection to Marilyn's status as an income beneficiary and her request that the Trust be terminated. A dispute subsequently arose about whether the Trustee could make discretionary payments to Marilyn in addition to the \$1,000 monthly income distribution, and the Trustee petitioned for instructions.

Settlement discussions in October 2014 were unsuccessful and, at an October 29 hearing, the court granted the Trustee authority to make discretionary payments—apparently as a further interim order because the issue was calendared for trial. In the meantime, the Trustee withdrew both its request to pay all earned income to Marilyn “as that request is a variance from the Trust provisions” and its request to pay out all net investment income. The Trustee proposed a settlement arrangement, as did Marilyn. Walker opposed both proposals. In April 2015, the parties reached a partial settlement: Marilyn would receive at least \$1,000 per month paid from Trust income and would be eligible for discretionary payments consistent with the original Trust language; the Trust's investment strategy would be updated to reflect current financial conditions; and the Trustee's other requests would be withdrawn without prejudice. The court signed an order modifying the Trust document to conform to the settlement.

In June 2015, the Trustee petitioned for instructions about whether to pay Marilyn's attorney fees (about \$66,000) and, if so, whether to pay those fees from trust principal or income. The Trustee argued, "[Marilyn] is entitled to payment of these fees and costs under both the Trust provisions entitling her to payment for her 'reasonable needs' and the Court's equitable powers." The Trustee further argued, "[T]here is some support for the payment of the [fees] from either the income or the principal. . . . On balance, the Trustee submits that the scale tips in favor of paying the [fees] from the principal as a matter of equity so that [Marilyn] is not essentially punished by having payments for future reasonable costs shortchanged because she had to spend Trust income to hire counsel to defend her income beneficiary status."

Appellant Robert Hink, another remainder beneficiary, objected to payment of Marilyn's attorney fees. He argued the Trustee violated its duty of impartiality by advocating payment of the fees, which was part of an ongoing breach of the Trustee's fiduciary duties. Robert argued the Trustee provided no analysis of why the fees could be paid pursuant to the discretionary payments provision. He further argued that the Trustee failed to "ascertain which of Marilyn's attorney's fees bills actually have to do with defending her position that she is an income beneficiary" or whether the fees incurred for that purpose were reasonable in amount. Robert argued that none of Marilyn's fees should be paid and requested an evidentiary hearing on the issue.⁶

⁶ Walker also opposed the fee petition in part, although she did not later appeal the fee award. She argued that the court should approve the payment of only \$41,796.59 of the almost \$66,000 in fees requested by Marilyn, to be paid from trust income rather than principal. Walker noted that Marilyn's status as an income beneficiary was no longer contested as of July 29, 2014, and argued payment should be limited to fees incurred prior to that date plus fees Marilyn incurred to participate in court-ordered settlement talks in October 2014. After those talks, Marilyn unsuccessfully pursued entitlement to all of the trust income and a proposal that she receive a \$50,000 commission for each remainder beneficiary who took a payment and opted out of the Trust. Walker argued that payment of any of Marilyn's fees from principal would violate express terms of the Trust.

Following an unreported hearing, the probate court issued a summary order directing all of Marilyn's fees be paid from Trust principal.⁷ Robert appeals.

II. DISCUSSION

Robert argues he was erroneously denied a full evidentiary hearing on the fee request and the probate court lacked authority to order the fees paid from Trust property. We infer that the court awarded the fees pursuant to its equitable powers and hold that this equitable fee award was error. We remand for the court to consider whether the fees should be awarded under the discretionary payments provision of the Trust instrument; if so, the court must direct that the fees be paid from Trust income rather than Trust principal. On remand, an evidentiary hearing must be held if material facts relevant to the fee request are in dispute.

As noted *ante*, the Trustee argued Marilyn's fees could be paid from Trust property pursuant to either the discretionary payment provision of the Trust instrument or the court's equitable powers. The probate court did not explain its rationale for the fee award in writing and the hearing on the fee petition was not reported. The discretionary payments provision of the Trust, however, only authorizes payments from Trust income and the court ordered Marilyn's fees to be paid from Trust principal. We therefore infer that the court made the fee award pursuant to its equitable powers.

In probate cases, "[t]here is no general rule which permits the recovery of attorney's fees by a successful litigant. Compensation for the services of an attorney must ordinarily be paid by the client employing him, in the absence of exceptional circumstances, such as a special agreement or special statutory provision. [Citations.] In addition to the exceptions provided by statute, there are certain actions in equity where the courts will award attorney's fees to a litigant. [Citations.] Thus, plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys."

⁷ There is no indication that any testimony was presented at the hearing. The clerk's minutes recite that the court made its order "after argument."

(*Estate of Marré* (1941) 18 Cal.2d 191, 192 (*Marré's Estate II*); see *Estate of Reade* (1948) 31 Cal.2d 669, 671–672.) Often referred to as the “common fund” theory (see *Hutchinson v. Gertsch* (1979) 97 Cal.App.3d 605, 617), this equitable rationale seeks “to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just.” (*Reade*, at p. 672.)

In *Marré's Estate II*, the beneficiary of a testamentary trust petitioned the court to instruct the trustees to reimburse him for his support, maintenance and education pursuant to the terms of the trust, following the decedent's death. (*Estate of Marré* (1941) 18 Cal.2d 184, 185–186 (*Marré's Estate I*); see *Marré's Estate II*, *supra*, 18 Cal.2d at p. 192.) The beneficiary partially prevailed (*Marré's Estate I*, at pp. 188–190) over other trust beneficiaries' objections (*Marré's Estate II*, at p. 192). The Supreme Court held that the petitioner was not entitled to payment of his attorney fees from trust property because he “benefited no one but himself in prosecuting his action.” (*Ibid.*; see *Estate of Myers* (1964) 230 Cal.App.2d 465, 467 [beneficiary's fees properly denied where beneficiary's “purpose was not to benefit or increase a fund for ultimate division between himself and others but was solely for his own benefit”].) In *Estate of Reade*, *supra*, 31 Cal.2d 669 by contrast, an estate beneficiary was entitled to recover fees she incurred in challenging the administratrix's failure to include certain assets in an accounting of estate property. (*Id.* at pp. 670–671.) “Here the successful contest by [the beneficiary] resulted in charging the administratrix in her first and final account with the additional sum of \$2,654 which then became available for distribution. A fund was thus created or preserved for the benefit of all the heirs. . . . The application of equitable principles would seem to require that the other heirs bear their proportionate share of the expense of the litigation.” (*Id.* at p. 672; see *Estate of Kann* (1967) 253 Cal.App.2d 212, 223 [fee award proper where beneficiary sued to establish that certain securities were part of estate, thus increasing value of estate].) However, litigation that results in an order merely clarifying the terms of a trust does not confer a benefit on the trust warranting an award of attorney fees. (See *Estate of Myers*, *supra*, 230 Cal.App.2d at pp. 467–468.)

We decide de novo whether an equitable award of fees on a common fund theory is permissible on the facts of the case.⁸

Here, Marilyn incurred fees to defend her position as income beneficiary under the Trust and to obtain increased monthly and discretionary payments as an income beneficiary—actions opposed by remainder beneficiaries, who faced delay and diminishment of their own benefits under the Trust if Marilyn was successful. The litigation did not increase or preserve the Trust property as a whole. “Thus there is no showing that the services rendered by [Marilyn’s] counsel were of benefit to the estate or to the trustee, or to anyone other than [Marilyn]. It follows that compensation for such services may not be paid from estate funds but must be borne by [her], in accordance with the general rule.” (*Estate of Myers, supra*, 230 Cal.App.2d at p. 468.)

In support of the fee award in the trial court, the Trustee also cited *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447 (*Wells Fargo*), a case it continues to rely on in this appeal. *Wells Fargo*, however, presented an unusual fact pattern that provides little, if any, support for a broad general equitable authority of the court that the Trustee urges here. The trustee in *Wells Fargo* petitioned for instructions on proper interpretation of a trust instrument to determine whether Donna Marshall, a deceased beneficiary’s second wife was an intended life income beneficiary under the trust, in addition to the

⁸ The parties disagree about the applicable standard of review. The Trustee argues the standard is abuse of discretion but relies on cases that discuss fee awards to trustees, which are governed by statute and committed to the trial court’s discretion. (See *Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1461; *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230.) Robert cites inapposite cases stating de novo review applies to interpretation of trust instruments and statutes. In our view, the question of whether the court has the equitable *power* to award fees on particular facts is an issue we review de novo, and the court’s exercise of equitable *discretion* within the scope of its equitable powers is reviewed for abuse of discretion. This approach appears to be consistent with *Marré’s Estate II*, where the Supreme Court held—without discussing discretion or deference to the probate court’s rulings—the appellant beneficiary in that case could not “bring himself within any of the recognized [equitable] exceptions to the general rule that each party must pay his own attorney’s fees.” (*Marré’s Estate II, supra*, 18 Cal.2d at p. 192.)

deceased beneficiary's minor child from an earlier marriage. (*Id.* at pp. 450–451.) Before ruling on the petition, the court ordered that attorney fees for all three parties, the trustee, Donna, and the minor's guardian ad litem, would be paid by the trust, one-half from principal and one-half from income. (*Id.* at p. 452.) The probate court found that Marshall was not an intended beneficiary, but Marshall succeeded in overturning the ruling on appeal. The appellate court then ordered Marshall's fees on appeal paid from the trust.⁹ (*Id.* at pp. 450–452, 458 [“[Marshall] is in equity entitled to be reimbursed for her fees on appeal”].) In our view, the fee award in *Wells Fargo* can only be understood in the context of the probate court's prior decision that *all* parties' fees would be paid from the trust. In light of that fact, it was inequitable to not pay Marshall's appellate fees as well, given that she ultimately prevailed on appeal. We do not find *Wells Fargo* relevant in the context of this case.¹⁰

The appellate briefs also discuss two inapposite cases that involve recovery of attorney fees by trustees rather than beneficiaries. (*Terry v. Conlan, supra*, 131 Cal.App.4th 1445; *Whittlesey v. Aiello, supra*, 104 Cal.App.4th 1221.) Trustees are

⁹ The reviewing court also rejected Marshall's challenge to a court order allowing the trust to pay the minor's attorney fees for her guardian ad litem during the period of her minority as “reasonable expenses.” (*Wells Fargo, supra*, 20 Cal.App.4th at p. 459.)

¹⁰ Robert argues *Wells Fargo, supra*, 20 Cal.App.4th 447 is distinguishable because Marshall had to respond to the trustee's petition in that case, whereas the Trustee here *supported* Marilyn's position and Marilyn filed papers and incurred fees only when Walker challenged the Trustee's position. In our view, this is a factual distinction between the cases that has no apparent connection to the award of fees. We consider it irrelevant.

The Trustee cites *Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, which in turn cites *Wells Fargo, supra*, 20 Cal.App.4th 447 with approval. *Rudnick* states in a footnote that, “based on the probate court's equitable powers alone, it has been held that beneficiaries who have incurred attorney fees . . . to vindicate their position as beneficiaries [citation] . . . are entitled to have those fees paid by the trust.” (*Rudnick*, at p. 1134, fn. 2, citing *Wells Fargo*, at p. 458.) This statement is mere dicta, as *Rudnick* addressed whether the probate court could require beneficiaries who litigated an issue in bad faith to pay the trustee's attorney fees from the beneficiaries' own trust distributions. (*Rudnick*, at pp. 1330–1331.) We do not read *Rudnick* as authority for the proposition that a probate court has general equitable power to award attorney fees.

generally entitled to recover attorney fees incurred in administration of or for the benefit of a trust. (*Terry*, at p. 1461; *Whittlesey*, at pp. 1226–1227.) In both cases the fee awards were improper because the trustees—who were also beneficiaries—were not acting to benefit the trust as a whole but taking sides in disputes among beneficiaries, thus violating the trustee’s duty of impartiality. (*Terry*, at pp. 1462–1464; *Whittlesey*, at pp. 1226, 1228, 1231.) The order before us is not an order for the payment of the Trustee’s fees so the cases are irrelevant.

We hold that the probate court did not have the general equitable power to order payment of Marilyn’s fees from trust property. The Trustee also sought authority “under Article V, Paragraph 2(C)-(D) of the Trust” to pay Marilyn’s legal expenses as additional amounts that are “ ‘reasonably necessary to assist [Marilyn] to cover [her] reasonable needs,’ ” asserting the Trust had sufficient income or accumulated reserves to make the increased payment. So far as the record reflects, this alternative basis for payment was never resolved. (See *Marré’s Estate II*, *supra*, 18 Cal.2d at pp. 192–193 [after reversing equitable award of fees, holding that fees might be payable under the trust’s terms as “a necessary expense of the beneficiary”].) On remand, the probate court must address this aspect of the Trustee’s fee petition and conduct an evidentiary hearing on any contested material factual issues. Probate Code section 1022 allows affidavits to be received as evidence only in “an uncontested proceeding.” In contested proceedings, “ ‘affidavits and verified petitions may not be considered as evidence’ [Citation.] Rather, absent a stipulation among the parties to the contrary, each allegation in a verified petition and each fact set forth in a supporting affidavit must be established by competent evidence.” (*Estate of Lensch* (2009) 177 Cal.App.4th 667, 676; see *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309–1310.) Here, for example, Robert contested whether the claimed fees were actually incurred on matters forming the basis of the fee request and contested the reasonableness of those fees. Where a party asserts in writing and at a hearing “that the factual conflicts presented by the parties’ competing declarations mandated an evidentiary hearing,” and where the facts are in dispute, the probate court

commits reversible error in denying the request for an evidentiary hearing. (*Bennett*, at pp. 1309–1310; *Lensch*, at pp. 676–678.)

III. DISPOSITION

The equitable award of fees is reversed. On remand, the probate court may reconsider the Trustee’s request to pay Marilyn’s fees pursuant to the discretionary payments provision of the Trust instrument. The Trustee shall bear Robert Hink’s ordinary costs on appeal.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

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